



In the Supreme Court of the United States

OCTOBER TERM, 1975

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THOMAS S. KLEPPE, SECRETARY OF THE  
INTERIOR, ET AL., PETITIONERS

v.

SIERRA CLUB, ET AL.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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REPLY BRIEF FOR THE PETITIONERS

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**In the Supreme Court of the United States**

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No. 75-552

THOMAS S. KLEPPE, SECRETARY OF THE  
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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
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**REPLY BRIEF FOR THE PETITIONERS**

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Although respondents' brief does devote six pages (pp. 48-50, 89-91) to a discussion of what we believe is dispositive in this case—the language and legislative history of NEPA—most of respondents' elaborate presentation discusses matters of only marginal pertinence. It is unnecessary, we believe, for courts to engage in the sort of environmental analysis that respondents present when, as here, there is no "recommendation or report on" a "proposal" for major

federal action with respect to respondents' region. We have discussed this at length in our opening brief and will not elaborate upon that subject here. Respondents' presentation seems to be an attempt to convert the relatively simple question whether an impact statement must be prepared prior to a recommendation or report on a proposal for major federal action into an examination of national environmental goals and needs that is neither required by NEPA nor appropriate for judicial resolution. It is with some reluctance, therefore, that we have prepared this lengthy reply brief. Many of respondents' arguments and assertions are irrelevant, but they are also inaccurate, and we believe that they should be corrected.

1. The "basic issue" in this case has never been "whether regional environmental statements must be done prior to federal actions concerning coal development in the Northern Great Plains" (Resp. Br. 40). The issue has always been whether the government must prepare one impact statement for the area chosen by respondents, which consists of portions of Montana, Wyoming and North and South Dakota. That was the question presented in our certiorari petition; that was the question decided by both courts below; and that was the question respondents sought to have decided (App. 11-26). Indeed, if the issue were the relatively abstract one whether regional impact statements should be prepared, we do not understand why respondents sought and the court of appeals granted an injunction preventing any further federal coal activity in the East-

ern Powder River Basin, which is in the Northern Great Plains and with respect to which a comprehensive "regional" impact statement has already been completed.<sup>1</sup>

Respondents argue, however (e.g., Resp. Br. 2, 26-28, 31-40), that the issue in this case has changed because the government's policy has changed. We disagree. The question for decision here still is whether NEPA *requires* the federal government to prepare an impact statement for the region of respondents' choosing, and that is not affected by the fact that the Department of the Interior voluntarily may prepare impact statements for groups of mines and regions larger than required by NEPA but smaller than that selected by respondents.<sup>2</sup>

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<sup>1</sup> It is because respondents define a broader "region" as the appropriate one among the many possible choices that they characterize the six-volume Eastern Powder River impact statement as a "subregional" impact statement (Resp. Br. 109). But see *Eastern Powder River Basin Impact Statement*, Vol. I, Part I ("Regional Analysis"). The court of appeals described the Powder River statement as a "regional impact statement" for a "subregion" (Pet. App. 27A).

<sup>2</sup> Despite its lack of relevance, one misimpression left by respondents' brief in this regard deserves correction. In support of their statement that the Department of the Interior "plans to do four additional environmental statements on subportions of the Northern Great Plains region" (Resp. Br. 26), respondents cite (*id.* at 36-37) Program Decision Option Document, The Proposed Federal Coal Leasing Program 38 (Dec. 16, 1975). This document, which respondents have lodged with the Clerk, merely lists for the Secretary areas that the Department's Bureau of Land Management "believes could be important for Federal coal leasing and which *could* be included in regional EIS's" (*ibid.*) (emphasis added). It does not represent a "plan" by the Department or a decision by the

In any event, there has been no significant change in the federal government's policy. Secretary Morton's affidavit of October 26, 1973, stated that the Department of the Interior would prepare impact statements for appropriate groupings of mines, geologic structures, basins and individual actions (App. 124). The district court found (Pet. App. 94A-95A) that impact statements might be prepared for "smaller subregions, geologic structures, basin, or selected individual actions." The district court reiterated this finding on remand (Pet. App. 108A). Judge MacKinnon observed (Pet. App. 78A): "The Government's position has consistently been that an impact statement must be prepared \* \* \* [and that] [w]here it finds that a statement covering related actions within an area is appropriate, a broader statement will be issued." The same position is taken in the *National Impact Statement* at page 1-5. We stated in our opening brief that appropriate regional impact statements will be prepared (Br. 8-9, 29, 37 n. 30, 47). Secretary Kleppe's affidavit of October 28, 1975, describes the Department's position fully (App. 189-196). And on January 26, 1976, the Department formally adopted the proposals contained in the *National Impact Statement* (Am. El. Br. 1a-14a). The position of the federal government has been consistent.\*

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Secretary; in fact, the Secretary has not decided to do four other impact statements covering large areas within respondents' region.

\* The Department's most recent statement of position is the testimony of Gregory Austin, Solicitor of the Department of

2. Respondents argue that an impact statement covering the portions of the four States they have designated is necessary in order to analyze various consequences of and alternatives to coal mining in this area (Resp. Br. 89-95). None of the subjects respondents suggest for consideration in an impact statement leads to the conclusion that NEPA requires such a statement for the particular region they have chosen. Moreover, the government already has analyzed many of these subjects.

For example, respondents first propose that the government compare the "availability, cost, environmental harm, and other factors of western and eastern coal" (Resp. Br. 92). If such a study were undertaken, it would appear appropriate to do so in the context of a nationwide review of coal mining on both federal and private lands, not (as respondents urge) in an impact statement covering selected portions of four of the western States that have coal deposits. Indeed, after the Department of the Interior circulated its draft of the *National Impact Statement*

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the Interior, before the Subcommittee on Minerals, Materials and Fuels of the Senate Committee on Interior and Insular Affairs (*Oversight Hearing on Federal Coal Leasing Program*), 94th Cong., 2d Sess., on February 16, 1976. Mr. Austin stated (pp. 67-68 of typescript tr. for that day): "We have admitted that we think there ought to be regional planning, but as opposed to this Sierra Club case, the Northern Great Plains case, we are not talking about a region that simply blankets a five [sic] state area. \* \* \* But we are talking about regions that are defined more by drainage areas, basin boundaries and economic independence."

ment, the Council on Environmental Quality commented in September 1974 as follows:<sup>4</sup>

The failure to discuss the role of eastern versus western coal is a serious deficiency. We appreciate the fact that this course was taken because the statement was intended to address only Federal coal leasing and that little Federal coal of consequence exists in the east. Yet Federal coal leasing decisions cannot be made in a vacuum. The economic availability of other coal supplies and the relative impacts of their development are critically related to *any* decision on Federal coal leasing. [Emphasis added.]

In response to CEQ's suggestion and the comments from other interested groups, including respondent Sierra Club,<sup>5</sup> the final *National Impact Statement* added a section assessing "the development of non-Federal Eastern and Western coal reserves rather than leasing additional Federal coal lands." *National Impact Statement* 9-4; see *id.* at 8-20 - 8-32.<sup>6</sup> Cf. *Eastern Powder River Basin Impact Statement* I-804 - I-805b (comparing mining in Appalachia and

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<sup>4</sup> *National Impact Statement* 9-24 (see our opening brief at 4, n. 1).

<sup>5</sup> See *id.* at 9-88, where the Sierra Club states that the *National Impact Statement* should compare western, mid-western and eastern coal.

<sup>6</sup> The *National Impact Statement* also considers the alternative of developing other sources of energy such as natural gas, oil and oil shale, nuclear power, solar energy, tidal and hydroelectric power and wind energy (pp. 8-3 - 8-25).

the economic impact there, as Sierra Club requested (*id.* at VII-700).

Respondents also suggest that the "regional" impact statement is needed to review "alternative technological methods for developing the coal resources" (Resp. Br. 94), to consider whether and how coal should be transported out of the region (*id.* at 93), and to analyze "soil conditions, rainfall, climate and other factors throughout the whole region" (*id.* at 92). But NEPA provides for an impact statement when there is "a recommendation or report on proposals for major Federal actions \* \* \*"; none of respondents' suggested topics for analysis leads to the conclusion that NEPA requires an impact statement for their particular region.

It simply begs the question in this case to say, as respondents do, that only an impact statement for their region could analyze soil conditions in their region<sup>7</sup> or consider the transportation of coal out

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<sup>7</sup> The *National Impact Statement*, at pp. 2-1 - 2-78, contains a description of the environment in the Western States, as well as other States that have coal deposits. The *Northern Great Plains Resources Program (NGPRP)*, at pp. 45-116 (see our main brief, at pp. 6-7) considers the climate, soil, vegetation, wildlife, water and so forth for the States of Wyoming, Montana, Nebraska and North and South Dakota. The *Eastern Powder River Basin Impact Statement* contains a detailed analysis of the climate, soil, vegetation, water resources and so forth for the portion of Wyoming in which the basin is located (pp. I-115 - I-398; see also, e.g., Vol. V).

of their region<sup>8</sup> or discuss the use of different means for extracting coal in their region.<sup>9</sup> The same could be said of any part of the United States encircled by an arbitrary boundary. The fact that only an impact statement addressed to respondents' region can study expressly that "region" alone does nothing to show why NEPA requires that their region be the object of such scrutiny.<sup>10</sup>

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<sup>8</sup> Volume III of the *Eastern Powder River Basin Impact Statement* discusses generally the transportation of coal out of that area (pp. II-1 - II-165) (see also, e.g., *id.* at I-678, III-91, III-120, III-141, III-154, VI-57, VI-91, VI-113, VI-128); the *NGPRP* also discusses the transportation and exportation of coal (1-35 - 1-37, 1-45 - 1-51); the *National Impact Statement* discusses the potential markets for coal from various sections of the country and transportation factors (e.g., 1-72 - 1-83). See also Bureau of Mines Information Circular 8690, *Long-Distance Coal Transport: Unit Trains or Slurry Pipelines* (1975).

<sup>9</sup> The *National Impact Statement* (e.g. at pp. 1-45 - 1-62, 3-26 - 3-27) discusses potential techniques for extracting coal. The *NGPRP*, at pp. 11-15, also discusses mining methods, as does the *Eastern Powder River Basin Impact Statement* (Vol. I, I-73 - I-78; see also Vols. II, III, IV).

<sup>10</sup> (a). Respondents also state (Brief, at pp. 74-75) that one impact statement covering their "region" is needed because, as the court of appeals put it, "development of one mine is considerably more than an irretrievable commitment to that mine. In the case of water supply, it forecloses the possibility of another, environmentally preferable mine" (*Pet. App.* 38A, n. 28).

First, as a statement of fact, this is not supported by evidence in the record and it is not accurate. See our opening brief, at p. 37. Further, respondents' argument does not support their choice of the "region" that should be studied in one statement: the development of one mine in the "region"

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they have chosen does not mean that all other mines in that region are foreclosed because of the water used by the first mine. If it did, there would only be one mine in the portions of the four States respondents have designated.

Second, to the extent respondents' argument suggests anything about the scope of an impact statement, it suggests that separate statements be prepared for each aquifer or basin (see note 3 *supra*) or that for each mine there be a separate statement considering the fact—if it is a fact—that such a mine would result in inadequate water for a mine located elsewhere. One thing respondents' argument does not suggest is a massive, single impact statement for their 90,000 square mile "region," which contains numerous underground formations and aquifers. See, e.g., *Eastern Powder River Basin Impact Statement*, Vol. I, at pp. I-195 - I-257.

(b). Respondents assert that an impact statement for the region they have chosen is needed in order to assess the consequences of a slurry pipeline for transporting coal (Br. 74-75, 93). But the federal government has not proposed a slurry pipeline; there is no federal report or recommendation on a proposal for major federal action on such a pipeline; all indications are that such a pipeline is purely speculative (see *Conservation Society of Southern Vermont v. Secretary of Transportation*, on remand, reprinted in our opening brief); the Sierra Club itself criticized the *Eastern Powder River Basin Impact Statement* (Vol. VI, at p. VII-941) for not devoting more discussion to slurry pipelines, which demonstrates that even respondents do not believe that such pipelines can only be analyzed in the context of an impact statement for their four-state region; and if respondents are dissatisfied with the discussion of slurry pipelines now contained in the Powder River statement they should direct a complaint to the adequacy of that statement, which they have not done. (While at one point respondents state that the discussion of slurry pipelines in the Powder River statement is too short (Br. 110), at another point they "strongly emphasize that an adequate regional environmental statement need not be nearly so long as the Eastern Powder River Statement" (*id.* at 102 n. 97).)

3. Respondents assert (Br. 62-65, 95-101) that the Council on Environmental Quality, which is within the Executive Office of the President, supports their position. That is not accurate. The *Sixth Annual Report of the Council on Environmental Quality* 641-643 (1975) describes this litigation without taking a formal position. Chairman Peterson of the Council testified (*Oversight Hearing on Federal Coal Leasing Program, supra*, at 118, 119) that it would be "improper for me to discuss the merits of the case" and that "[t]here are many ways to defined [sic] geographical areas."<sup>11</sup> What is more, we consulted with the Council in the preparation of our opening brief, which incorporates suggestions made by it. The Council has advised us that it has not taken the position that an impact statement for any particular geographical area is required by NEPA.

4. Respondents also assert that the Environmental Protection Agency supports them. The letter of William Ruckelshaus in 1972, quoted at Resp. Br. 64-65, suggests that "over-view statements" should be prepared whenever possible. The *National Impact Statement* is such a statement. Nothing in Mr. Ruckelshaus' comments indicates that the Northern Great Plains region defined by respondents is a necessary or appropriate area for such study. The 1972 comments of Mr. Ruckelshaus quoted at Pet. App.

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<sup>11</sup> CEQ's comments upon the *National Impact Statement* (at p. 9-24) do not suggest that impact statements are necessary for regions smaller than the Nation but larger than the Eastern Powder River Basin.

37A-38A, n. 28, and at Resp. Br. 97-98, indicate that a comprehensive study "similar to the Southwest Energy Study" should be carried out. But the Southwest Energy Study is not an impact statement. It is an overview—an ~~over~~view remarkably similar in scope and function to the Northern Great Plains Resources Program, which EPA participated in and which was designed and carried out after the date of Mr. Ruckelshaus' letter. The Department of the Interior has, therefore, carried out the analysis that the EPA Administrator requested.<sup>12</sup>

5. Respondents' brief contains numerous factual assertions not taken from the findings of the district court. While we do not propose to dispute the accuracy of these assertions,<sup>13</sup> we believe that they must be approached with caution. Very few of the

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<sup>12</sup> Regardless whether NEPA required the Department to undertake the Northern Great Plains Resources Program, the fact remains that it did so.

<sup>13</sup> With one significant exception. Respondents state (Br. 11), as did the court of appeals (Pet. App. 5a, n. 4), that "[f]ourteen federal coal leases covering 90,000 square miles, issued prior to the effective date of NEPA, are presently operating." In fact, the entire "Northern Great Plains region" proposed by respondents contains only 90,000 square miles. The findings of fact of the district court (*id.* at 88A-89A) indicate that 167,000 acres (approximately 261 square miles) are under lease. Of these, mining is being carried on in leases totaling 14,785 acres (approximately 23 square miles). See pages 175-179 of the record in the court of appeals. The surface area actually mined is still smaller. The Belle Ayr South mine of Amax, Inc., the most productive coal mine in the nation, mines only 160 acres (one-quarter square mile) per year. Affidavit of W. Hollie Hopper, Amax Br. X5-X9.

figures, statements, and assertions pertain to the region defined by respondents. Their "region" (see Resp. Br. 103) contains less than half of the area of Montana, North Dakota, South Dakota and Wyoming. The Northern Great Plains Coal Province defined by the Department of the Interior, however, contains most of Montana, North Dakota and South Dakota, one-third of Wyoming and Nebraska, and portions of Colorado and New Mexico (see *National Impact Statement* 1-35, 2-26, 2-47). The interrogatories propounded by respondents, and the answers upon which many of the district court's factual findings are based (App. 150-172), deal with the full area of Montana, North Dakota, South Dakota and Wyoming. And the Northern Great Plains Resources Program studied "63 counties covering 91.6 million acres [approximately 143,125 square miles] of Montana, Wyoming, North Dakota, South Dakota, and Nebraska. The analyses of physical resources focused on the coal fields of the Fort Union Formation \* \* \*. The analyses of other resources, in several instances, covered a much larger portion of the five-state area \* \* \*" (April 1975 review, p. 3).

As this discussion indicates, the available statistics and data pertain to areas different from the "region" defined by respondents. In fact, the map at Resp. Br. 103 is significantly misleading. The map shows a large shaded area (indicating coal deposits), surrounded by a line defining respondents' region. In fact, the shaded area does not represent coal deposits at all; it is drawn from a geologic map (Plate

A-3, *NGPRP*) showing only geologic formations, which may or may not contain coal. Respondents nevertheless ask the Court to infer that they have selected the most, if not the only, logical boundary for "regional" analysis. But respondents' map omits a depiction of most of the coal in the area. The map that follows depicts *all* of the coal fields in the States in question.

**COAL FIELDS of the NORTHERN GREAT PLAINS  
and ROCKY MOUNTAIN PROVINCES**



As this map demonstrates,<sup>14</sup> respondents' region is quite arbitrary. Any number of other lines could have been drawn to encompass all or part of the coal-bearing portions of these States. And respondents have yet to demonstrate why their border is not only preferable but also mandatory.

6. Respondents' rely (Br. 51) upon *Jones v. Lynn*, 477 F.2d 885 (C.A. 1), a case not discussed in our opening brief. The First Circuit has indicated that *Jones* does not support respondents. See *Chick v. Hills*, 528 F.2d 445, 448 (C.A. 1) (until the federal government adopts a plan for participation in a large program, there is no need for an impact statement analyzing the entire program; statements on smaller portions of the program are sufficient). Respondents cite numerous other cases (Br. 50-62) as supporting their position. We believe that our opening brief and the opinion of Judge MacKinnon characterize more accurately the holdings of these cases, and we will not repeat this discussion.

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<sup>14</sup> This map, like respondents', exaggerates the size of the coal deposits. Relatively discrete areas within the shaded portions of the map contribute almost all of the economically recoverable coal. Compare Plate B-3 of the Northern Great Plains Resources Program maps (back pocket) with page 100 of the April 1975 "Review" of that Program. Plate B-3, which most closely approximates respondents' region, demonstrates that less than five percent of the shaded area of respondents' map contains a "known stripping coal deposit." Very few mines are located within 50 miles of any other mine. Only 30 active or proposed mines are scattered throughout 90,000 square miles.

7. Twenty-two states have filed a brief as *amici curiae*. This brief is a theoretical overview of the usefulness of comprehensive impact statements. We do not believe that our presentation is necessarily inconsistent with the position of these States. *Amici* have not requested this Court to affirm the judgment of the court of appeals. And we have agreed (Br. 36-38) that impact statements must comprehensively analyze the effects of the proposal in question. The question in this case, however, is not whether a particular impact statement must be comprehensive, but whether there must be an impact statement at all for the region respondents have chosen.

For the foregoing reasons, in addition to those set forth in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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